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No. 98-556

FILED
NOV 2 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

October Term, 1998

ROSELLA E. BURNS, *et al.*,

Petitioners,

vs.

STONE FOREST INDUSTRIES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit erred in determining that the calculation of back pay under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), should be based on working days rather than calendar days within the statutory sixty-day notification period.

STATEMENT PURSUANT TO RULE 29.6

Respondent Stone Forest Industries is a division of Stone Container Corporation. Stone Container Corporation has issued shares to the public.

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OPINIONS BELOW

The Magistrate Judge's Findings and Recommendations granting Respondent Stone Forest Industries' Motion for Summary Judgment is reprinted in the appendix to the Petition for Writ of Certiorari at 15a. The Order of the District Court adopting the Magistrate Judge's Findings and Recommendations is reprinted in the appendix to the Petition for Writ of Certiorari at 13a. The Judgment of the District Court is reprinted in the appendix to the Petition for Writ of Certiorari at 12a. The opinion of the United States District Court of Appeals for the Ninth Circuit affirming the District Court's judgment is reported at 147 F.3d 1182 (9th Cir. 1998), and is reprinted in the appendix to the Petition for Writ of Certiorari at 2a.

STATEMENT OF THE CASE

Petitioners Rosella E. Burns, Timothy Ray Keener, Ted-Hyun Kim, Emil Martin, Belle McGovern, Brenda L. Miotke, Keith Miotke, William Parker, Lavern Rhodes, Orrin Savage and Larry Vetter, on behalf of themselves and others similarly situated, commenced this action in the United States District Court for the District of Oregon against Respondent Stone Forest Industries ("Stone Forest") on March 25, 1995, pursuant to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 (1988). Specifically, Petitioners contended that they were entitled to damages equal to back pay and benefits for each calendar day of Respondent's violation of the WARN Act's sixty-day advance notice requirement.

On January 16, 1996, Stone Forest filed a motion for summary judgment on the grounds that, inasmuch as Stone Forest had paid its former employees back pay for every

working day within the notification period, Petitioners were not entitled to any further recovery under the terms of the WARN Act.[1]

On March 21, 1996, Magistrate Judge Coffin (the District Court Magistrate Judge whose findings and recommendations were adopted in their entirety by District Court Judge Michael Hogan) granted Stone Forest's motion for summary judgment, holding that damages under the WARN Act should be calculated by working days within the notice period, rather than calendar days.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling. The Ninth Circuit agreed with the majority of the federal appellate courts which have previously ruled on the issue in concluding that the measure of damages under the statute should be based on the number of days an employee would have worked during the statutory notice period. *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters District Council of New Orleans v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). After reviewing the ambiguous statutory language and legislative history, the Ninth Circuit looked to the approach which most serves the WARN Act's statutory purpose of "providing a two-month uninterrupted income stream facilitating a job search." The Court concluded that the work days approach is a more rational approach than the calendar days approach.

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[1] Petitioners also cross-moved for partial summary judgment on the same issue.

REASONS FOR DENYING THE WRIT

There is nothing about this case which merits review by this Court. Five of the last six federal appellate courts that have ruled on the issue presented here have rejected Petitioners' arguments, and the work day approach is consistent with the purpose, provisions and legislative intent of the WARN Act.

I.

THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT

A. Five of the Last Six Appellate Courts to Address this Issue have Agreed that the Work Day Approach is the Correct Measure of Damages Under the WARN Act.

Petitioners contend that there exists among the federal courts of appeals an inter-circuit conflict regarding the proper measure of damages under the WARN Act and that the conflict "undermines WARN's national policy as articulated by Congress, the statutory scheme of the Secretary of Labor, and fosters inequitable treatment of plaintiffs, misguided interpretations of the act, and uncertainty for litigants." (Petition for Writ of Certiorari ("Petition") at 9). However, of the six federal appellate courts which have considered the appropriate measure of damages under the WARN Act, the last *five,* including the court below, have held that working days rather than calendar days is the correct way to calculate the back pay due workers under the statute. *Burns v. Stone Forest Industries, Inc.*, 147 F.3d 1182 (9th Cir. 1998); *Breedlove, et al. v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797 (8th Cir. 1998), *cert. denied*, 1998 WL 407117 (Oct.

5, 1998); *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters District Council of New Orleans v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Only one appellate court -- the Third Circuit in *United Steelworkers of America v. North Star Steel Company*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), the first appellate court to consider the issue -- has adopted the calendar days approach, and it did so without reference to the legislative history of the WARN Act. Its reasoning, and that of the Petitioners in this case, has been specifically rejected by the federal appellate courts which have subsequently ruled on the issue. Therefore, contrary to Petitioners' contentions, there is little conflict among the federal appellate courts on the issue.

Moreover, this Court denied certiorari in *Breedlove*, *Dillard* and *North Star Steel* and dismissed certiorari in *Frymire*. If certiorari was inappropriate in those cases, when the split in the circuits was more pronounced because fewer courts had ruled on the issue, it is even more inappropriate now, when the conflict among the circuits has been reduced further by the consistent holdings of the federal appellate courts. Since the Third Circuit's decision in the *North Star Steel*, the federal courts of appeals have been unanimous in rejecting the calendar days approach.

Similarly, Petitioners' contention that the lower courts are divided on the issue is meritless. First, the minimal differences among the lower courts on the issue has been largely resolved by the consistency of the federal appellate courts' opinion since *North Star Steel*. Indeed, the lower courts outside the Third Circuit have with near unanimity, applied the working days approach to the calculation of

damages under the WARN Act. *See Local 1239 v. Allsteel, Inc.*, 9 F.Supp. 2d 901 (N.D. Ill. 1998); *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Company*, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. March 14, 1994); *Breedlove v. Earthgrains Baking Companies, Inc.*, 963 F.Supp. 802 (E.D. Ark. 1997); *Washington v. Air Cap Industries, Inc.*, 860 F.Supp. 307 (D.S.C. 1994); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1292 (E.D. Tenn. 1990), *amended in part*, 753 F.Supp. 218 (E.D. Tenn. 1990); *In Re Hanlin Group, Inc.*, 176 B.R. 329 (Bankr. D.N.J. 1995); *In Re Riker, Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993). Petitioners cite only two cases which apply the calendar days approach, both of which were from the District of Massachusetts. *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F.Supp. 182 (D. Mass. 1995); *United Electrical, Radio and Machine Workers of America v. Maxim, Inc.*, 1990 WL 66578 (D. Mass. May 15, 1990).

Thus, the granting of certiorari in this case would not, as Petitioners contend, eliminate a conflict among the courts. The issue of the correct calculation of WARN Act damages has been thoroughly litigated in the appellate and district courts, and little conflict exists.

B. The Secretary of Labor's 1995 Amicus Brief is not Entitled to Substantial Deference.

Petitioner argues that an amicus brief from 1995 in the *Carpenters* case, setting forth the Secretary of Labor's interpretation of an ambiguous provision of the WARN Act, should be accorded substantial deference by the Court. Deference principles do not apply, however, because Congress did not delegate to the Secretary of Labor any authority to pronounce policy. Rather, Congress authorized the Secretary

of Labor to "prescribe such regulations as may be necessary to carry out this chapter." 29 U.S.C. § 2107(a).

The Secretary's position in 1995 that back pay should be calculated by calendar days is not "necessary to carry out" the Act. Instead, the Secretary advocates a particular public policy choice that affects the extent to which employers will be punished and employees will receive a windfall for an employer's non-compliance with the notice requirements. Whereas the Secretary lacks any authority to proclaim public policy, the Court need not accord any deference to the position. *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (finding delegation of administrative authority is a precondition to deference).

Moreover, the only interpretative gap appearing in the legislation concerns the methods by which employers may provide notice of a plant closing. Congress expressly authorized the Secretary to enact regulations filling this gap,[2] and such administrative interpretations have been codified.[3] The absence of any regulation interpreting the back pay provision reveals the Secretary's belief that Congress did not include such policymaking authority in its delegation of duties.[4] Accordingly, because the Secretary lacks authority to pronounce policy choices on the enforcement provisions of the WARN Act, the Court should decline to accord any deference to the previous position advocated by the Secretary.

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[2] 29 U.S.C. § 2107(a).

[3] 20 C.F.R. § 639 et seq.

[4] The absence of any regulation renders inapposite *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (permitting Secretary of Health and Human Services to belatedly advocate an interpretation of Secretary's own regulation).

C. The Work Day Approach is Consistent with the Purpose, Provisions and Legislative Intent of the WARN Act.

Petitioners assert that the Ninth Circuit decision merits review by this Court because, they contend, it misconstrues the purpose of the WARN Act. Contrary to Petitioners' assertions, however, the Ninth Circuit did not err in reaching the conclusion that Congress intended to limit damages under the WARN Act to pay employees would have received had they continued to work during the notice period. The Ninth Circuit's holding in this respect is entirely consistent with both the statute's language and congressional intent.

The WARN Act is designed to provide employees with sixty-days warning of plant closings and mass layoffs. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a); 134 Cong. Rec. 15,923 (June 24, 1988). A covered employer must notify all employees or their union, as well as the local government, in writing, of its intention to close a plant or engage in a mass layoff sixty days prior to the action. 29 U.S.C. § 2102(a); *See also United Food and Commercial Worker's Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996); *North Star Steel Company v. Thomas*, 515 U.S. 29, 30 (1995). The fundamental purpose of the WARN Act is to ensure that employees receive advanced notice of their loss of employment due to plant closures and mass layoffs so that they have an opportunity to obtain new jobs or, where necessary, retraining. 20 C.F.R. § 639.1(a) (1994).

Section 2104(a)(1)(A) of the WARN Act provides that if an employer violates the statute's notice provision, the employer must pay each aggrieved employee "back pay for each day of violation," to be computed as not less than the

higher of "(i) the average regular rate received by such employee during the last three years of the employee's employment; or (ii) the final regular rate received by such employee." 29 U.S.C. § 2104(a)(1). The statute also provides that the amount for which an employer is liable should be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. § 2104(a)(2)(A). Damages may also be reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(B).

Petitioners contend that the purpose of the WARN Act is to "provide affected employees . . . with sixty days advance notice of a plant closing or mass layoff, in order to provide the best opportunity for the affected government units and unions to assist workers with readjustment assistance and re-employment while the business is still in operation" (Petition at 14). Petitioners argue that the work day approach contravenes the fundamental purpose of the WARN Act because it permits employers to "willingly withhold advanced notice, shut their doors and then pay 'business interruption insurance' to their workers in lieu of notice. . ." (Petition at 16).

It is the *calendar* day approach, however, that contravenes the fundamental purpose of the WARN Act. First, by requiring a violated employer to pay employees substantially more than what they would have earned had notice been given sixty days prior to the shut down, the calendar day approach has an unintended punitive effect on employers who are already struggling to maintain operations. Second, the calendar day approach gives rise to incentives that directly undermine the WARN Act's objective. Requiring employers to pay employees substantially more than they

would have earned during the notice period would compel employers to require employees to report to their places of employment even when their employers are no longer in a position to maintain general operations, thus depriving these employees of the paid time off they otherwise would have had to find new employment. Under these circumstances, although the employees would receive the same pay as that under the work day approach, they would be afforded much *less* of an opportunity to seek new employment and/or job retraining.

Similarly, Petitioners' contention that "forum shopping" will occur as a result of the work day approach has little merit. As discussed previously, five of the last six appellate courts to decide this issue have ruled in favor of the work day approach.

Moreover, Petitioners' contention that an employer suffers no adverse consequences for failure to comply with the notice provisions of the WARN Act is unfounded. As the *Allsteel* court noted, "Employers have an incentive to comply with the WARN Act because they do risk a loss: paying wages to employees but not receiving the benefits of their labor." 9 F.Supp. 2d at 905. Employers also risk paying civil penalties to local governments for failure to provide adequate notice, as well as the payment of attorneys' fees and prejudgment interest if a lawsuit is successfully brought by its former employees. 29 U.S.C. § 2104. Thus, contrary to Petitioners' contentions, there is ample incentive for an employer to comply with the statute, even when damages are limited to working days within the notice period.

II.

THE WORK DAY APPROACH MAKES MORE SENSE

A. The Calendar Days Approach Would Lead to Inconsistent and Anomalous Results

The Ninth Circuit correctly noted that the calendar days approach would lead to anomalous and unfair results. The example set forth by the Court in *Dillard*, and reiterated by the Ninth Circuit, of the absurd result engendered by a calendar days approach compared the damages which should be awarded to employees working different hours during the notice period. 15 F.3d at 1285.[5] Under the calendar days approach to calculation of damages, a full-time employee who works ten hours a day, four days a week, would be entitled to 600 hours worth of pay (ten hours multiplied by sixty days) for a violation of the WARN Act. Another employee who works eight hours a day, five days a week -- the same amount per week as the first employee -- would only be entitled 480 hours of pay (eight hours multiplied by sixty days) for the same violation. A part-time employee who works only ten hours a day, one day a week, also would be entitled to 600 hours of pay (ten hours multiplied by sixty days), 120 hours more than that awarded to the full-time employee. *See Dillard*, 15 F.3d at 1285. As the Court in *Dillard* noted:

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[5] This hypothetical situation was first raised in *North Star Steel* but was rejected by the Third Circuit because the situation was purely hypothetical and because the Third Circuit was unwilling to discuss the method of calculating damages under §§ 2104(a)(1)(A)(i) and (ii). *North Star Steel*, 5 F.3d at 43.

> Under this calendar-day system, not only is the employer severely penalized for choosing to pay damages in lieu of notice, but the full-time employee is treated inequitably, and the part-time employee gets a windfall.

Id.

Such anomalous results would not occur under the work day approach because the employee receives pay only for the hours he or she would have worked during the sixty-day period following a shut-down. The part-time employee, who would have worked only once a week during the sixty-day period, would not receive more pay than the full-time employee.

Petitioners argue that the inequitable results would not occur under a calendar days approach if courts measure damages based on the calculation of overtime rates under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Petitioners, however, offer no authority for the proposition that the term "regular rate" in the WARN Act is derived from the FLSA or that the method for calculating overtime rates under the FLSA is the method to be used to calculate back pay under the WARN Act. The definition of "regular rate" is not contained in either the WARN Act nor its regulations, and neither the WARN Act or its regulations contain any reference to calculation of damages under the FLSA overtime rates. *See* 29 U.S.C. §§ 2104(a)(1)(A)(i), (ii); 20 C.F.R. § 639.1 *et seq.*

In addition, Petitioners' suggestion that the FLSA regulations calculate the "regular rate" as a daily average over

a five-day week is erroneous. The FLSA's regulation specifically states that "[t] the "regular rate" under the act is a rate *per hour*." 29 C.F.R. §108, 109 (emphasis added). The hourly rate is calculated by dividing a worker's weekly non-overtime pay by the number of hours the employee worked in that week. 29 C.F.R. § 778.109. The language of the WARN Act clearly contemplates calculation by *days* and not by weeks: An employer is liable for "back pay for each *day* of violation. . . ." 29 U.S.C. § 2104(a)(1)(A) (emphasis added). Nor have the courts calculated WARN Act damages with reference to the overtime "regular rate" calculation of the FLSA. *See*, e.g., *Washington*, 860 F.Supp. at 320 (damages calculated by multiplying hourly rate by eight hours by the number of working days in the notice period without reference to FLSA).

Petitioners also argue that the conference report applies a calculation of the $500-a-day civil penalty for violations of the act for each *calendar* day within the notice period, and that the damages for aggrieved employees should be calculated in the same way (Petition at 23). The penalties applied to actions brought by local governments, however, are not available to allegedly aggrieved employees, whose recovery is specifically limited to "back pay for each day of violation." 29 U.S.C. § 2104(a)(1)(A). The statute provides that "[t]he remedies provided for in this section shall be the exclusive remedies for any violation of this chapter." 29 U.S.C. § 2104(b). Because the *civil penalty* is payable to a local government only, and is not based on any work day calculation, there is no alternative but to apply the calendar day approach. With respect to the "back pay" allegedly due employees, however, the working day calculation is not only possible but makes more sense than the calendar day approach. Thus, the penalty provision with respect to local governments is neither applicable nor relevant

to the calculation of back pay under the damages provision available to aggrieved employees.

B. The Work Day Approach is not a Misapplication of the Cannons of Statutory Construction

Plaintiffs also contend that the Ninth Circuit misapplied the cannons of statutory construction by severing the term "back pay" from its context in the phrase "back pay for each day of violation" (Petition at 26). In fact, the Ninth Circuit considered the term "back pay" in the proper context and concluded that the case could not be resolved by "reading the words and looking up their definitions, because a literal reading of the the words and syntex of the statute allows for [adoption of either the calendar day approach or the work day approach]. . . ." 147 F.3d at 1183-84. Because the phrase "back pay for each day of violation" and the legislative history were ambiguous, the Ninth Circuit concluded that the preferable way to resolve linguistic ambiguity is to "evaluate the alternative readings in light of the purposes of statute." *Id.* Thus, the Ninth Circuit did not, as Petitioners contend, "misapply the cannons of statutory construction."

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted

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